IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 632 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SAYBABHAI SAGRAMBHAI GAMAR

Versus

STATE OF GUJARAT

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Appearance :

MR HR PRAJAPATI for Appellant

MR SP HASURKER APP for Respondent

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CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date : 22/07/2005

ORAL JUDGMENT

1 This appeal is preferred under Section 374(2) of the Code of Criminal Procedure against a judgment and order dated 18th of July, 2001, delivered by learned Additional Sessions Judge, Surendranagar, in Sessions

Case No. 60 of 1996, convicting the present appellant for the offenses punishable under Sections 363, 366 and 376 of the Indian Penal Code. The appellant was sentenced to undergo rigorous imprisonment of three years and to pay fine of Rs.5,000/-, in default to undergo simple imprisonment of six months for the offence proved against him under Section 363 of the Indian Penal Code, he was sentenced to undergo rigorous imprisonment of five years and to pay fine of Rs. 7,000/-, in default to undergo simple imprisonment of one year for the offence punishable under Section 366 of the Indian Penal Code and he was sentenced to undergo rigorous imprisonment of 7 years and to pay fine of Rs. 7,000/- in default to undergo simple imprisonment of one year for the offence punishable under Section 376 of the Indian Penal Code. It is also directed by learned Trial Judge that all the sentences shall run concurrently and that under trial period would be given in set off to the appellant. It is further directed by the learned Trial Judge that Rs. 10,000/- be paid to the victim from the amount of fine if recovered from the appellant. The appellant is in judicial custody during this criminal Appeal, and was not released on bail during trial. He preferred Criminal Misc. Application No. 6704 of 2005 for releasing him on

bail after suspending the sentence, but on inquiry it was found that the paper book is ready, so the Appeal is finally heard. The appellant has undergone including period of set off imprisonment of about three years and 11 months.

2 As observed by the Apex Court in the matter of STATE OF PUNJAB vs. RAMDEV SINGH, as reported in AIR 2003 SCW, 6947, the name of the victim is not published in the judgment, but she is referred as victim.

3 Prosecution case discloses that victim along with her family i.e. parents and three other brother and sisters resided at village Reshmiya of Chotila Taluka, District Surenderanagar. The victim is third children of her parents. The incident in question occurred at about April 1996. The accused appellant was a school teacher in a primary school of village Reshmiya, where victim was studying as his student. The victim studied upto Std. VII and thereafter she left study as the parents suspected relationship of the victim with the appellant. The houses of the appellant and the victim were situated nearby and leaving after 4 to 5 houses of the victim, the houses of appellant was situated. The

appellant was married, but it appears that his wife was not constantly staying at village Reshmiya. As per the prosecution case, in absence of his wife, appellant used to call the victim and was committing rape upon her. On account of this, the victim was pregnant for about four months when she was found with the accused around 24th of April, 1996. The prosecution story discloses that the appellant threatened the victim that if victim did not go with the appellant, she would be killed. Threats were also administered to kill brother of the victim. On 13th of April, 1996, the victim appears to have left her house along with the appellant. The prosecution case is that the appellant threatened the victim to go to his house early in the morning at 5.00 am and therefore he directed victim to go along with the appellant. Thus, on 13th of April, 1996, both of them left village Reshmiya and went to village Meldi on foot. From Meldi, they went to Chotila and from Chotila they boarded one truck and went to village Vankaner. They reached at Vankaner at noon and stayed overnight in one guest house at Vankaner. In the said guest house also the accused administered threats to the victim that if victim discloses anything, she would be done to death. The appellant – accused also used to administer threats to the victim not to disclose

the fact that the victim was pregnant. In the said guest house, again the appellant committed forcibly intercourse with the victim. Thereafter, it appears that for some days they moved around the villages and towns of relatives of the appellant and during this period also appellant committed rape on victim wherever they stayed overnights. They stayed together in this manner for about 10 days and ultimately both were found from village Belwada of Sabarkantha District on 24th of April, 1996 by the then Investigating Officer Jaswantsinh Bhikhubha Jadeja. Both of them was found near one temple of Lord Shiva. On 13th of April, 1996, the victim left the house and on 14th of April, 1996 at about 10.00 a.m. Father of the victim gave a complaint before Chotila Police Station to the effect that he himself was serving as Conductor in Gujarat State Road Transport Service at Chotila Depot. After giving the details of his family, he stated that on 12th of April, 1996 he had been to his job and returned on 13th of April, 1996 at noon. He was told by his wife that on earlier night all of them after watching TV slept in the open space i.e. front yard of their house. His wife further stated to him that when she awakened at 5.00 am, she found that victim was not in her bed. Therefore, she searched for the victim in the village. According to

complainant, the victim was aged 17 years and was studying in 7th Std. In Primary school where the appellant accused was her class teacher. He suspected of having illicit relation between the two and her study was discontinued. Complainant also searched the victim in their own village and at possible places where he found that appellant was also missing. Therefore a complaint came to be filed for the offenses punishable under Sections 363, 366 of the Indian Penal Code. During investigation, first Investigating Officer Jaswantsinh Bhikhubha Jadeja found both of them, as above said, on 24th of April 1996. Both of them thereafter were sent to medical examination where it was found that the victim was pregnant by four months and her clothes, blood, etc. were seized. Thereafter, the investigation was handed over to PSI Chotila Police Station Surajibhai Khavraji Kharadi, who after investigation, submitted charge sheet against the appellant for the above said offenses.

4 The case being committed to the Court of Sessions, a charge for the above said three offenses came to be framed against the present appellant on 26th July, 2000 at Exh. 25 where he pleaded not guilty and hence the prosecution produced following witness in support and

to prove its case.

PW-1 Radheshyam Mohandas : Exh. 10

PW-2 Jagrutiben Radheshyam : Exh. 12

PW-3 Jaswantsinh Bhikhubha Jadeja : Exh. 19

PW-4 Mahendrakumar Jayantilal Upadhyay Exh. 23

PW-5 Dr. Pankajkuar Chhotalal Doshi : Exh. 26

PW-6 Surajibhai Khavraji Kharadi : Exh. 29

The prosecution also tendered following documentary evidence.

1. Medical certificate of the accused : Exh.14

2.Forwarding letter of Sample of accused : Exh.15

3.Arrest panchnama of accused – Exh. 15

4.Panchnama of Seizure of samples of victim- Exh. 17

5. Panchnama of seizure of clothes of victim– Exh. 18

6.True copy of page NO.9 of Birth register – Exh.24

7.Birth certificate of Jagrutiben Radheshyam- Exh.25

8.Police Yadi – Exh.27

9.Medical certificate of victim – Exh. 28

10.Original complaint – Exh.30

11.Copy of station diary Entry No.9 – Exh.31

12.Forwarding letter of mudammal to FSL – Exh.32

13.Receipt regarding mudammal recd by FSL – Exh.33

14.Report of FSL – Exh.34

15.Serological report Exh. 35

5 Thereafter as per Section 313 of the Code of Criminal Procedure, further statement of appellant was recorded. Though he denied that he had seduced the victim and committed rape, but he admitted that the victim study was discontinued on account of suspicion that there was illicit relation between them. He also admitted that on 24th of April, 1996, the victim was found with him by the Police at village Belwada. He also admitted that he was a class teacher of the victim and was staying nearby of the house of the victim. He denied that the victim was seduced by him and on account of rape committed by him, the victim became pregnant. He denied all other circumstances appeared against him in the evidence which was put in his examination under Section 313 of the Code of Criminal Procedure. He denied to tender any defence witnesses and stated that a false case is filed against him and a false compliant is lodged against him.

6 The learned Trial Judge thereafter heard learned APP and the defence counsel and came to the

conclusion that from the evidence on record it was amply established that the appellant committed rape upon the victim and on account of that, victim was got pregnant. Relying upon the provisions of Section 114 of the Indian Evidence Act, learned Trial Judge observed that a case of rape is established against the appellant and it was for the appellant to rebut the presumption arose against him that the act was with the consent of the victim as she was aged about 17 years. Learned Trial Judge after appreciating the evidence on record, came to the conclusion that the appellant failed to plead and prove his case of consent and therefore after appreciating the evidence on record, the learned Trial Judge concluded that the appellant was guilty for the offence punishable under Sections 363, 366 and 376 of the Indian Penal Code and appellant was sentenced as aforesaid.

7 As being appellate court, it becomes the duty of the Court to undertake threadbare scrutiny of the evidence adduced on record independently. After appreciating the evidence on record thoroughly, an independent conclusion may be reached as to whether the appellant is guilty of the offence charged against the appellant. Thereafter it is to be concluded whether the

Trial Court has reached to just conclusion. To undertake this exercise, it is necessary to appreciate the evidence adduced on record.

8 As above said, the prosecution has attempted to prove its case through testimonial conclusions of six witnesses and by above mentioned documentary evidence. It is necessary to go through the said evidence to appreciate the same properly.

9 The prosecution examined PW-1 Radheshyam Mohandas at Exh.10 being father of the victim. He deposed that he was serving as Conductor in State Transport Corporation. It is also to be noted that his deposition is recorded on 3rd of November, 2000. PW-1 Radheshyam Mohandas further stated that the victim was his number 3 children and his family was staying at village Reshmiya. He further stated that the incident took place before four years of recording of his evidence. When on 13th of April, 1996, his daughter left his house, he was on his duty. On next day, when he reached to his house at Reshmiya, he was informed by his wife that on earlier day his children and wife after watching TV slept in front yard of the house, but when

she awakened early in the morning found that the victim was not in her bed. So, after getting assistance from his brother Pravin Mohandas and other persons – Lakha Limba, Lavji Ram, Rasik Manjaram, etc. he searched for his daughter. He also searched in the village for the appellant. The appellant was not found and hence he lodged a complaint before Chotila Police Station. He stated that at the time of the incident, his daughter was about 16 years of age. Three months prior to the incident, her study in the school was discontinued because he suspected that there might be illicit relationship between victim girl and appellant. He identified appellant in the court and stated that the appellant was serving as a teacher in the school. Thereafter, he deposed that his complaint was recorded in the police station as per his say. The complaint was shown to him. He confirmed the contents of the complaint Exh.11. He further stated that 12 days after lodging of the complaint, his daughter was found by the police. He stated that the birth of the victim took place in government hospital at Chotila, and birth is registered in the records of gram panchayat of Chotila. In his examination in cross, he stated that he married in 1973-74. After about 2 years of marriage, the first child was

born. He deposed that on the day of recording of the deposition, his youngest daughter would be about 20 years of age. He stated that after the birth of the victim, Chandrika was born after about two years. He stated that he could not remember when the victim started her schooling. He admitted that during her study, the victim had failed once in the examination. He stated that he could not remember whether the victim failed in fourth standard. He admitted that his house is besetted by compound wall having a door. The said compound wall is about 5 to 6 feet height. The door of that compound was having a bolt and could be closed from inside. Ordinarily, after bolting the main road, they slept. He admitted that there is a population of agriculturists, etc in village Reshmiya. He also denied that in their village ordinarily people rises at about 4.00 am to 5.00 am. He stated that people rises at about 5.30 to 6.00 a.m. In cross examination he further stated that the school of the village is situated about 250 meters from his house and his house is surrounded by other residential premises. His brother was staying in neighbourhood. The appellant was staying three houses away from his house. He stated that he did not witness who actually abducted his daughter.

10 PW-2 at Exh. 12 victim is examined. In first part of her deposition, she stated about her family and family members. Thereafter she deposed that the incident took place before about four years. She was studying in school of village Reshmiya. She studied upto Std. 7th. Appellant was her class teacher. She identified appellant before the court. She further stated that the appellant was staying 4 to 5 houses away from her house. She further stated that in absence of wife of the appellant at village Reshmiya, the appellant was calling her frequently and was committing rape on her. On account of which she was pregnant by four months. She stated that thereafter appellant stated to her that if she did not go with him, she would be done to death. She was threatened. She deposed that threats were administered to kill her brother as well. Thereafter the appellant told to her that at about 4 to 5 at night she should go to the house of appellant and accordingly she reached at the house of appellant and from there on foot they went to village Meldi and from Meldi they went to town Chotila and from Chotila, according to the prosecutrix, they boarded one truck and went to Vankaner at noon and stayed overnight in one guest house. According to her, they stayed in the

said guest house for 2 to 3 days. Till the end of their stay at guest house, the appellant threatened her not to divulge or else, the appellant would kill her. She further deposed that the appellant also threatened not to disclose that she was pregnant. She further stated that in the said guest house, the appellant was forcibly committing intercourse with her. She stated that at what various places they went from Vankaner, she could not say, but she stated that after leaving Vankaner, they went to various places of the relatives of the appellant. Wherever they stayed night at the relatives of the appellant, the appellant was committing rape against her will. After leaving Reshmiya, she stayed for about 10 days with the appellant. Thereafter appellant and she was arrested by the police from village where sister of the appellant was staying near one temple. The police brought them to village Chotila. She was sent to Limbdi for the medical examination where she was examined by the Doctor. After bringing them to Chotila, police seized the clothes worn by her. Police recorded her statement. She again stated that the person who committed rape on her was the appellant. She stated that before about six months from leaving village Reshmiya, the appellant for the first time committed rape on her. In her examination-in-cross,

she stated that she was aged about 6 to 7 years when she started schooling. She admitted that she was poor at her studies. She stated that she studied up to 7th Std. She stated that couple of time she failed in her examinations. She denied that she failed twice in Std.3 and Std.4. She further stated that in her school, there were six teachers. The school was up to 7th Std. She admitted that in each standard, the class teacher was different, but in Std.6 and in Std.7, there was one class teacher. She stated that it was not true that she had learn t reading and writing properly till she reached up to the Std. VI and VII. She was copying her home work. She admitted that she did her home work at her house. She came in the class of appellant from Standard 6th and from Standard 6th the appellant was her class teacher. She denied that she had affair with the appellant from the time she was studying in Standard Sixth. She denied that till she reached to Standard Seventh, the said affair converted in deep love. She stated that she never loved appellant. She denied that she was writing love letters frequently to appellant. She denied that she wrote about 35 to 40 letters to appellant. She denied that she wrote letters and threatened in the letters to the appellant to run away with her. She denied that she was threatening

to the appellant that if appellant did not marry her, she would commit suicide. She admitted that from her house to the school, the house of appellant was not situated on way. She did not complete Standard Seventh and in between she discontinued study. She denied that her parents came to knew about love affairs between her and the appellant and, therefore her parents discontinued her study. She denied that even after leaving the school, she had love affairs with the appellant and she was frequently visiting his house. She denied that in the presence of wife of the appellant also she used to visit the house of appellant. She admitted that her house situated at Reshmiya was enclosed by compound wall. She also admitted that at night after bolting the main door they slept. She denied that the statement before the police she did not state that “the appellant told her that they should run away and if the victim did not accompany him, she would be done to death and was threatened like that, and that appellant also threatened to kill her brother.” She denied that she did not state before the police that appellant told to her to go to his house at about 4.00 to 5.00 pm and, therefore, she had been to the house of the appellant. She stated before the police that “they went to Chotila on foot from village Meldi”. She stated that

it was not true that in her statement before the police, she did not state that “in the said guest house we stayed for three days.” She denied that she did not state before the police that “till the end of the stay at the guest house the appellant was threatening her not to divulge anything or else, I shall kill you and threatened me not to disclose that I was pregnant.” She stated that from Reshmiya to Chotila no other persons met them. She stated that when they reached at Chotila, there were many persons and there were persons at guest house at Vankaner. She stated that out of those persons, she did not reveal to any of them that the appellant was kidnapping her. She stated that that was because the appellant had threatened her earlier. She further deposed that on the day of the incident at night she, her mother and her two brothers were sleeping. She did not reveal to any family member that appellant had threatened her. She denied that the appellant had not given any threats to her. She denied that, about relationship between her and the appellant, her parents were aware and that was the cause for her parents to discontinue her studies. She denied that even then she continued love affairs with the appellant. She denied that she was afraid that her parents would beat her. She denied that

after discontinuance of her study, her parents restricted her movements out of her house. She denied that she started love affairs with the appellant willingly and she ran away with the appellant willingly. She denied that she instigated the appellant to run away with her. She denied that no incident had happened as deposed by her. She denied that on account of fear of reputation, the appellant was falsely involved in the said case.

11 PW-3 Jaswantsinh Bhikhubha Jadeja is examined at 19 and he stated that on 14th of April, 1996, he was in-charge of Dahod Police Station as Police Sub-Inspector and complainant lodged the complaint of the case. After recording complaint he investigated the case and recorded the statement of witnesses. On 23rd of April, 1996, he went to village Salera, Dantrada and Ambasar, etc. of Khedbrahma Taluka to the relatives of the appellant and upon an information, the appellant and the victim were found by him on 24th of April, 1996 in the sim of village Belwad near on temple of lord shiva. He drew a panchnama of arrest of appellant and both of them were brought to Chotila. The clothes were seized worn by both of them and both of them were sent to medical examination. After the medical examination, the victim

expressed her wish to go with her father and, therefore, she was entrusted to her father. Statements of victim as well as the appellant were recorded and the further investigation was entrusted to PSI of Chotila police station. He identified the appellant being accused of the case before the court. In July, 1996, again he was in-charge of investigation of this case and he submitted charge sheet against the appellant. In this cross-examination, he stated that Khedbrahma is at a distance of 8 to 9 hours, from Chotila they reached at Chotila at about 11.00 p.m. He admitted that the said travelling was recorded in log book of the jeep. He stated that they made halts for tea, but not for lunch or supper. He denied that he did not record the statement of victim. He stated that first statement was recorded of the victim and thereafter of the accused. On 5th of April, 1996 victim was sent to medical examination. He admitted that the victim did not state before him that the accused had threatened her and also threatened to kill her brother if the victim did not run away with the appellant. The witness also deposed that in a statement before him the victim though did not state that the appellant told her to reach at his house 4.00 to 5.00 and therefore she reached at his house at 4.00 to 5.00 a.m., but she did

state that against her will, the appellant committed rape on her and threat was administered that if the victim revealed the incident, the same would not be good for her. The witness also deposed that she did state before him that the appellant told her that there is no other alternative for them except to run away and, therefore, according to the wish of the appellant, she reached at the house of appellant on 13th of April, 1996 and as said by the appellant she went away with him. Witness deposed that in her statement victim did not state that from Meldi to Chotila they went on foot and that they stayed in the guest house for 2/3 days. The witness admitted that the victim did not state in a statement before him that in the guest house also the appellant was threatening her. The witness admitted that during his investigation he did not come to know the name of the guest house in which the victim and appellant were staying at Vankaner. He stated that in her statement the victim did state that the victim had physical relationship with the appellant was known to the family of the victim and, therefore, she was forced to leave the study.

12 PW-4 Mahendrakumar Jayantilal Upadhyay is

examined at Exh. 23 being Junior Clerk of Chotila Gram Panchayat. He produced on record original birth registration register of 1979 in the court to prove the date of birth of the victim girl. He stated that in Chotila gram panchayat a register is kept and he produced original Register of 1979. On 31st of May 1979, there was a registration of birth in respect of the victim and the registration is made on 1st of June, 1979 of the birth of 31st of May, 1979 at Sl. No. 130. At Exh. 24 he produced copy of the entry of such register. He identified the signature made by Registrar of panchayat in said register. A certificate issued by panchayat in respect of birth register of the victim is also produced by him at Exh. 25. In his cross-examination, he stated that if the birth took place at hospital, then the register of the hospital could be transmitted to panchayat through peon, and on that basis births were registered in said register. If the birth has taken place in house, then if responsible member of the family requested them for the registration of the said birth, then the said birth ordinarily was being registered in the register. He admitted that if the child was named and such name is offered, then the name of the child was entered in the register, and if such name was not offered, then it was

registered as to whether the child was male or female. He admitted that the hand writing on Exh. 24 were not his because he was not in the said job at that time. He also admitted that in said Sl. No. 130 in Col. No. 5, the name of the victim was entered by red ink and everything else was noted by blue ink. He stated that this indicated that the name of the victim was not entered on 1st of June, 1979 but was entered thereafter at any time. He admitted that he had no personal knowledge as to the Entry No.130.

13 PW-5 Dr. Pankajkumar Chhotalal Doshi is examined at Exh. 26 and he stated in his examination that on 25th of April, 1996 at about 3.45 the victim was brought before him with police yadi, which he produced at Exh. 27 and on examination he found as under :

> “H/o Alleged Rape. Original clothes has been taken by police before taking her for examination. Age about 17. Ht 5' 1” Wt. 48 kg. Teeth 7-7/7-7. Identification mark: Black mole over neck. No mark of ripples over face, breast, lower abdomen. Inner side of thigh lab mole and minora . Axillary and pubic hair not noticed and semen or blood. Scanty

saved. Breast well developed. Primary Arolla present - unmarried. S/B. FTG :- LMP. GM.A. No external injuries on body seen. Breast - both breast normally developed. Pubic hair. No stained blood or semen. Hymen old tear admit 2 (two) finger loosely. P/A Left 14 cms. size. Soft mobile, EB + vaginal smear taken for spermatozoa and gonocoal Ex. Ad – antenatal care – Ad – USG in exact gestations & conferment of pregnancy, saliva, blood, pubic hair taken sealed and handed over to police.

Conclusion : Pregnancy present. No evidence of recent intercourse."

He stated that he produced medical certificate at Exh. 28. In his cross-examination he stated that the age of the victim was mentioned as per her say. He stated that as per the opinion of Gynaecologist there was no presence of recent intercourse with the victim.

14 PW-6 Exh. 29 Surajbhia Khavraji Kharadi, the then second Investigating Officer and PSI of Chotila Police Station is examined. He stated that on 4th of September, 1995 to 19th of June, 1996 he was working as

PSI at Chotila Police Station. At about 10.00 am on 14th of April, 1996 father of the victim appeared before the Police Station and offered his complaint which he recorded as per the say of the complainant. The complainant signed in his presence and he also signed the complaint which he produced at Exh. 30. From the above complaint, a crime was registered and extracts of concerned station diary was produced by him at Exh. 31. He further stated that he took the investigation and recorded the statements of witnesses. He obtained birth date certificate of the victim. He informed the Circle Police Inspector because in such cases the Circle Inspector was required to investigate. On 25th of April, 1996, the Circle Police Inspector entrusted the investigation to him and he sent samples of blood, semen and saliva etc. seized from the accused as well as the victim to Forensic Science Laboratory vide forwarding letter Exh. 32. He received the opinions of Forensic Science Laboratory which produced at Exhs. 34 & 35. In his examination in cross, he denied that he did not record the complaint as per the say of the complainant. He denied that he did not record the statement of the witnesses as per their say. He admitted that ordinarily the panchnama of place of offence was drawn in each

investigation. He admitted that in this case he did not draw any such panchnamas.

15 This was the evidence of the prosecution tendered in the Trial Court.

16 Learned Advocate Mr. Prajapati on behalf of the appellant in this appeal raised mainly three contentions. Firstly, it was vehemently urged that this is a case of consent from the victim's side and it is proved beyond doubt that the victim was beyond the age of 16 and capable of consenting the alleged act. Secondly, it was urged that the prosecution failed to prove its case in respect of the age of the victim being 17 years of age. Learned Advocate for the appellant raised this contention with regard to the offenses proved against the appellant in respect of Sections 363 and 366 of the Indian Penal Code. It was contended that the register of the birth produced on record and taking into consideration evidence of PW-4 Mahendrakumar Jayantilal Upadhyay, a Clerk of panchayat, it is not certain that whose birth was recorded on 1st of June, 1979 as the name of the victim as per the say of this witness was entered by red ink thereafter. Therefore, the victim is not proved by the

prosecution below the age of 18 and hence the case under Sections 363 and 366 of the Indian Penal Code is also not proved. Thirdly, it was contended with respect to this aspect that as per the ingredients of Sections 363 and 366 of Indian Penal Code, prosecution failed to prove the case of “taking away” the victim from the guardianship of the parents as it is the case on record that the victim girl left her house at her own volition. Magnifying these three main contentions, learned Advocate for the appellant further stated that the Trial Judge wrongly applied Section 114(A) of the Evidence Act in the present case that the case of the prosecution would not fall within the ambit of sub-Section (2) of Section 376 of the Indian Penal Code. It is stated that Section 114(A) of the Evidence Act would be attracted only if the case falls within the Clause (2) of any of the sub clauses of clause (2) of Section 376 of the Indian Penal Code. It is, therefore, stated that the presumption which learned Trial Judge applied is per se erroneous and thereafter drawing attention of this court to Section 375 of the Indian Penal Code, it was argued that the case would not cover within the first clause of Section 375 as evidence discloses that the victim had having relationship with the appellant for last about six

months and on account of that, as admitted by the father of the victim, she was forced to leave the school and discontinued the study and, therefore, the sum and substance of the submission was, when girl above 16 continues illicit relationship for such a long period, the inference can only be drawn that it cannot be against the will of the victim. Referring to clause Secondly of the said Section 375, it was again stated that the act cannot be said without consent of the victim as the long duration of the relationship only indicates consent on the part of the victim. It is further stated that this fact was known to the family members of the victim and the manner and the conduct in which the victim behaved leaving the house on her own volition and staying with the appellant for 10 days necessarily leads to the conclusion that the victim was consenting party of the act and had it not been so, the victim would have conveyed to his family members and others even after first physical contact between two. Drawing attention of this Court towards the evidence of various witnesses it is stated that the location of the house of the victim, the admission of the victim in her deposition that she stayed for 10 days with the appellant after running away and even then she did not utter a word to

anybody mentioning that she had such opportunity of running away from the custody of appellants, leads to the only inference of consent of victim in the act. Drawing my attention to Clause Thirdly of Section 375, it was argued that probably the case of the prosecution appears to be in Clause Thirdly when consent of victim has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. In this respect, learned Advocate on behalf of the appellant vehemently submitted that the case of the victim about administering threats is an improvement and she did not disclose this fact first time before the police. My attention was also drawn to the deposition of the victim where she was confronted with her police statement and the contradiction which was proved in the evidence of the Investigating Officer. Therefore, the learned Advocate for the appellant stated that from the conduct of the victim it is clear that she was consenting party to the intercourse and that the case of consent under threat is an improvement and cannot be believed. It was stated that even after leaving the house, the conduct of victim is such that though she had an opportunity to run away from the custody of the appellant, she continued in his company. My attention was further drawn to the charge

wherein it is indicated that the appellant committed rape on the victim during the period of 13th of April, 1996 to 24th of April, 1996. It is submitted that the prosecution case of having committed rape by the appellant before 13th of April, 1996 is not disclosed in the charge and that charge is not framed against the appellant. So far as period from 13th of April, 1996 to 24th of April, 1996 is concerned, though the victim suggests about intercourse wherever they had gone, but it is not supported by medical evidence as medical certificate Exh. 28 in conclusion denotes that there was no evidence of recent intercourse. Thus, there is no charge against the accused for the period of having committed rape before 13th of April, 1996 and for the period for which the accused is charged, the theory of rape advanced by the victim is not supported by medical evidence. The medical evidence also denotes that there was no mark of injuries on the person of the victim which is an additional factor of appellant being innocent. So, it is stated that in any case, firstly, the rape is not committed by the appellant and in this respect the evidence of victim is not trustworthy. Secondly, the case of consent when Section 114(A) of the Evidence Act does not apply, is probablized from the evidence of the victim herself and

from the evidence of the father of the victim. It was stated that before police whatever the case of threat victim disclosed was in respect of the period when the victim left her house, but not before that i.e. the case of prosecution is not proved that the victim surrendered to the appellant on account of any threat first time. It is stated that the story of threat is developed afterwards so probably because the victim got pregnant and wanted to leave the house and go with the accused, and this is supported by the evidence as above said. It is, therefore, urged that the case under Section 363 and 366 of the IPC is not proved by the prosecution, and if the case of rape is proved, then there is ample evidence on record to come to the conclusion that victim was a consenting party. Learned Advocate for the appellant relied upon the following decisions to support his contentions, which will be discussed later on, whenever it is necessary. Ultimately it was submitted that the learned Trial Judge erred in convicting the appellant and sentencing him. It was submitted that appeal is therefore required to be allowed and appellant is required to be acquitted of all the three charges under the Indian Penal Code levelled against him. The cases relied upon by learned Advocate for the appellant are as

under :

1. S. Varadarajan v. State of Madras, AIR 1965 SC 942.

2 Pratap Misra v. State of Orissa, AIR 1977 SC 1307.

3 Tukaram v.State of Maharashtra, AIR 1979 SC 185.

4 Lalta Prasad v. State of MP, AIR 1979 SC 1276.

5 Chote Lal v. State of Haryana,AIR 1979 SC 1494.

6 State of Karnataka v. Sureshbabu Puk Raj Porral AIR 1994SC 966.

7 Shyam v. State of Maharashtra AIR 1995 SC 2169.

8 Kuldeep K Mahato v State of Bihar, (1998) 6 SCC 420.

9 State of Rajasthan v. Shanker, (2000)9 SCC 161.

10 Suresh N Bhusare v.State of Maharashtra, (1999) 1 SCC 220.

11 State of Rajasthan v. Kishanlal, (2002) 5 SCC 424.

12 Jinish Lal Sah v. State of Bihar, (2003) 1 SCC 605.

13 Uday v. State of Karnataka, (2003) 4 SCC 46

14 Aman Kumar v. State of Haryana, (2004) 4 SCC 379.

15 Deelip Singh v. State of Bihar, (2005) 1SCC 88.

17 Learned APP Mr. S.P. Hasurker on behalf of the

State supporting the conclusion of the Trial Judge stated that it must be viewed from the angle that it is a case where victim is complaining rape against her teacher, who was her class teacher. In fact, it is stated that the offence is committed by the appellant not only after 13th of April, 1996 but before that by which the victim got pregnant. Learned APP Mr. Hasurker stated that the victim in ample terms established her case of 363 and 366 of the Indian Penal Code and a case of rape without her consent and against her will. The evidence of prosecutrix, according to learned APP Mr. Hasurker, is trustworthy and the contradiction magnified by the learned Advocate for the appellant are inconsequential and it is proved through the evidence of the Investigating Officer that even before the police the case of the prosecution was about threat administered by the appellant to the victim. Learned APP further stated that the evidence of victim is extremely trustworthy, and victim of rape committed by a teacher, cannot be expected to offer a parrot like version in respect of her dishonour. It is stated that the courts must be sensitive in appreciating the evidence of victim of the rape and this is worst kind of incident where her own teacher victimized the victim. It is further stated that during trial nowhere it is the

case of the appellant that the act was done by the consent of the other party nor any evidence is led by the appellant. He relied upon three decisions of the Apex Court in the matter of (i) STATE OF UP vs. SHREE KANT SHEKARI, as reported in 2005 SCC (Cri) 327; (ii) STATE OF M.P. vs. MUNNA CHOUBEY AND ANR., as reported in 2005 SCC (Cri) 559 and (iii) STATE OF UP vs. PAPPU alias YUNUS AND ANR., as reported in 2005 SCC (Cri) 780. It is submitted that the Trial Judge rightly and properly dealt with all the contentions and no interference is required in the conclusion of the Trial Court and even this is not a case where leniency is required to be shown to the accused. It is therefore submitted that the appeal be dismissed.

18 Having heard learned counsels for the parties at length and having appreciated the evidence adduced on record very carefully, it is necessary first to ascertain that how the case under Section 376 of the IPC is viewed by the courts. It is necessary therefore to note that what is rape on female in general. The rape is viewed in simple term to obtain carnal knowledge of a woman by force and against her will. In the matter of BHUPINDER SHARMA vs STATE OF H.P., as reported in (2003) 8 SCC

551, the Apex Court observed in para 10 and 11 as under :

> “10. The offence of rape occurs in Chapter XVII IPC. It is an offence affecting the human body. In that Chapter, there is a separate heading for “Sexual offenses”,which encompasses Sections 375, 376, 376-A 376-B, 376-C and 376-D.” Rape” is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fact that sweeping changes were introduced reflects the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “the carnal knowledge of a woman by force against her will”. “Rape” or “raptus” is when a man hath carnal knowledge of a woman by force and against her will (Co. Litt. 123-B); or as expressed more fully, “rape is the carnal knowledge of any woman, above the age of

particular years, against her will; or of a woman child, under that age, with or against her will" (Hale PC 628). The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape: (1 Hon. 6, 1a. 9 Edw. 4, 26 a (Hale PC 628)]. In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephen's Criminal Law, 9th Edn., p. 262). In Encyclopaedia of Crime and Justice (Vol. 4, p. 1356) it is stated ".... even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (4th Edn) Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation with violence of the private person of a woman – an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order."

11.The physical scar may heal up, but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. An accused cannot cling to a fossil formula and insist on corroborative evidence, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable. Judicial response to human rights cannot be blunted by legal jugglery. A similar view was expressed by this Court in Rafiq v. State of U.P., with some anguish. The same was echoed again in Bharwada Bhoginbhai Hirajibhai v. State of Gujarat. It was observed in the said case that in the Indian setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition-bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be

conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is an inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine for conviction in a rape case. The observations of Vivan Bose J. in Rameshwar v. State of Rajasthan were :

> “The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make is safe to dispense with it, must be present to the

mind of the judge.....”

19 It is therefore clear that the rape is most hated heinous crime amongst the human race and must be viewed as observed by the Supreme Court in the above said decision of Bhupinder Sharma (supra) very seriously.

20 Time and again the Apex Court as well as various High Courts directed the Trial Courts to be sensitized towards such offenses and appreciate the evidence on hard reality of the human life and surrounding circumstances. In the matter of BODHISATTWA GAUTAM vs. MISS SUBHRA CHAKRABORTY, as reported in AIR 1996 SC 992, in para 10 the Apex Court observed as under :

> 10.Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore,

the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the Right to Life contained in Article 21."

Thus, the rape is not only a crime, but a flagrant violation of the victim's most cherished of the fundamental rights. The law of the land declares that prosecutrix in a rape is not an accomplice or a part-taker of the offence and her evidence must be appreciated at par with the evidence of any other injured witness. Physical injury to a woman body is less harmful than the injury to mental fabric of a person and that too on account of biological differences of male and female in human race. Firstly, it must be noted that there is no rule of law that prosecutrix in a rape case requires any corroboration. In appreciating the evidence of prosecutrix what care a court is required to take is well guided by the Apex Court and explained in the matter of STATE OF PUNJAB vs. GURMIT SINGH and ORS., as reported in AIR 1996 SC 1393. In para -12 the Apex Court was pleased to observe as under :

"12. From the statement of the prosecutrix,

it clearly emerges that she was abducted and forcibly subjected to sexual intercourse by the three respondents without her consent and against her will. In this factual situation the question of age of the prosecutrix would pale into insignificance. However, in the present case, there is evidence on the record to establish that on the date of the occurrence, the prosecutrix was below 16 years of age. The prosecutrix herself and her parents deposed at the trial that her age was less than 16 years on the date of the occurrence. Their evidence is supported by the birth certificate Ex. PJ. Both Trilok Singh PW6 and Gurdev Kaur PW7, the father and mother of the prosecutrix respectively, explained that initially they had named their daughter, the prosecutrix, as Mahinder Kaur but her name was changed to ..... (name omitted), as according to The Holy Guru Granth Sahib her name was required to start with the word “Chhachha” and therefore in the school leaving certificate her name was correctly given. There was nothing to disbelieve the explanation given by Trilok Singh and Gurdev Kaur in that behalf.

The trial court ignored the explanation given by the parents observing that “it could not be swallowed being a belated one.” The trial Court was in error. The first occasion for inquiring from Trilok Singh PW6 about the change of the name of the prosecutrix was only the trial when he was asked about Ex. PJ and there had been no earlier occasion for him to have made any such statement. It was, therefore, not a belated explanation. That apart, even according to the lady doctor PW1, the clinical examination of the prosecutrix established that she was less than 16 years of age on the date of the occurrence. The birth certificate Ex.PJ was not only supported by the oral testimony of Trilok Singh PW6 and Gurdev Kaur PW7 but also by that of the school leaving certificate mark “B”. With a view to do complete justice, the trial Court could have summoned the concerned official from the school to prove various entries in the school leaving certificate. From the material on the record, we have come to an unhesitating conclusion that the prosecutrix was less than 16 years of age when she was made a victim of

the lust of the respondents in the manner deposed to by her against her will and without her consent. The trial court did not return any positive finding as to whether or not the prosecutrix was below 16 years of age on 30th March, 1984 and instead went on to observe that even assuming for the sake of argument that the prosecutrix was less than 16 years of age on 30th March, 1984, it could still not help the case as she was not a reliable witness and was attempting to shield her own conduct by indulging in falsehood to implicate the respondents." the entire approach of the trial Court in appreciating the prosecution evidence and drawing inferences therefrom was erroneous."

21 Reverting to the fact of the case while appreciating the evidence of a prosecutrix, the grave and solid aspect which requires to be taken into consideration is in respect of fiduciary relationship between the appellant and the victim. It must be borne in mind that the victim is rustic village school girl studying in Std. VII in primary school of village Reshmiya where the appellant is a school teacher and

remained her class teacher for Std. VI and VII. It is very easy to win over a rustic village school girl when such fiduciary relationship between the party exists. The Apex Court has viewed this aspect as under in the matter of STATE OF H.P. vs. SHREE KANT SHEKARI, as reported in 2005 SCC (Cri) 327. In first para, the Apex Court in this respect observed as under :

> “The factual matrix of this appeal is unfortunately related to sordid and obnoxious incidents where the respondent (hereinafter referred to as the “accused”) who at the relevant point of time was working as a teacher gratified his animated passions and sexual pleasures by having carnal knowledge of his student, a girl of tender age. The result was that the sacred relation of teacher and his pupil was besmirched. As observed by this Court in Madan Gopal Kakkad v. Naval Dubey, such offenders are a menace to civilized society.”

22 Considering the case of prosecutrix in her deposition it becomes clear that beyond doubt it is established by the prosecution that a rape was committed

upon the victim. Appreciating the evidence of prosecutrix Exh. 12, she stated in clear terms that appellant being her class teacher, used to call her in absence of his wife and was frequently committed rape on her, which resulted in her pregnancy. There is no reason to disbelieve this version of the prosecutrix. The law requires that this version of the prosecutrix does not require any corroboration. No female would come forward and announce that her modesty and chastity was ravished against her will and consent. When prosecutrix deposes before the court that she was ravished and unless grave circumstances are brought to the notice of the court to appreciate along with the say of the prosecutrix, the version must be accepted and not to accept such version, that would amount to add to her injury and insult. It may be true that there may be cases where prosecution might be suffering from inherent infirmities. The court may not rely even upon prosecutrix if such inherent infirmities are found in prosecution case, but on scrutiny if it is found that the version of prosecutrix is acceptable weighing the same on the principles of appreciation of evidence, in such cases, as guided by the Apex Court despite some discrepancies not affecting the core of the prosecutrix evidence, the version of the prosecutrix

must be accepted and viewed seriously. Therefore, in many decisions, the Supreme Court has observed that the prosecutrix must not be put to par with an accomplice, but she is an injured witness, whose evidence requires no corroboration. Appreciating the evidence of the prosecutrix, it is clear that nothing is brought about in cross-examination to disbelieve the version of the prosecutrix. When she was forced to leave her studies, it could not be said that since her family members knew about the illicit relationship and since this fact is denied by the prosecutrix, her version should not be believed. This is an insignificance circumstance when the crux of the matter is whether rape is committed upon the victim. The overwhelming corroborative evidence in support of the say of the victim is medical certificate denoting her pregnancy to the extent of four months and further the fact that both were found together from a distant place, which is proved by PW-3 Jaswantsinh Bhikhubha Jadeja. The learned Trial Judge therefore rightly come to the conclusion that it is appellant and appellant only was guilty of committing rape upon the victim. Learned Advocate for the appellant though has drawn my attention to certain contradictions aspect to the victim in cross-examination proved through the

Investigating Agency in respect of administering threats, would not destroy the case of the victim so far as it relates to committing rape. In the matter of STATE OF PUNJAB vs. RAMDEV SINH, as reported in AIR 2004 SC 1290, the Apex Court observed as under in paras 10, 11, 12 and 13.

> “10. Further, the victim's evidence has been discarded by holding that it is at variance with the medical evidence. The High Court has not indicated as to in what way it is variance with the medical evidence. Mere statement that according to doctor, victim's vagina admitted two fingers and she could on earlier occasions have had sexual intercourse five, ten or fifteen times rules out rape by accused once as alleged in no way casts doubt on victim's evidence.
>
> 11.Learned counsel for the respondent accused pointed out that rape as claimed by the victim was discounted by the evidence of PW-2, who did not find visible injury when she medically examined the victim. In our opinion the same is of no consequence. The doctor

examined the victim after about 3 weeks. That being so, the effect of the act on the physical form was practically obliterated. That is not denied by the doctor. Merely because the friend of the victim was not examined that also cannot be a suspicious circumstance to throw suspicion on the victim's evidence.

12. Another factor which seems to have weighed with the High Court is the evidence of doctor PW-4 that there were signs of previous sexual intercourse on the victim. That cannot, by stretch of imagination, as noted above, be a ground to acquit an alleged rapist. Even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to

rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or pray for being sexually assaulted by anyone and everyone. Finally, if we may say as a last straw, is the fallacy in High Court's reasoning about lack of evidence relating to the employment of the victim as a maid-servant. The High Court completely overlooked the fact that the suggestions given to witness, more particularly PWs 4, 5 and 7 that the accused or his wife had threatened to put an end to the victim's service as a maid-servant because of her immoral character or refusal to refund the amount taken as advance for her employment as a maid-servant.

13. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her

> testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, fit the Court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do. "

23 Necessary it is to observe that the contention of learned Advocate for the appellant in respect of dividing period of committing rape must be dealt with in pursuance of the above observations of the Apex Court. Defect in framing of the charge is only curable irregularity and would not vitiate the prosecution case. Appreciating of the attending circumstances, it is clearly revealed that the learned Trial Judge framed the charges against the accused from the complaint filed by

the father of the victim on 13th of April, 1996 and therefore this error is crept in the charge to mention the period of the crime between 13th of April, 1996 to 25th of April, 1996. It is not the charge but the version of the prosecution case relying upon the deposition of the prosecutrix, the evidence would be viewed and weighed, it could not therefore be said that there is no case against the appellant for the period before 13th of April, 1996 because the tenure which victim girl deposes is about for six months prior to 13th of April, 1996. 13th of April 1996 may be a climax of the crime but in fact crime committed much prior to that and only because this was not mentioned in the charge, it could not be said that the appellant could not be saddled with the liability of the charge which is not framed against him. The case of crime committed earlier very well contained in police papers as a prosecution case and the accused appellant was well aware of that. Therefore, it could not be said that the period of crime before 13th of April 1996 to 25th of April, 1996 cannot be taken into consideration. The contention of learned Advocate for the appellant that during this period also no crime was committed for which reliance was placed on a medical certificate concluding that there was no evidence of recent intercourse cannot

be accepted. When version of prosecutrix is appreciated in this respect, it is clear that wherever both of them stayed, the appellant committed rape. There is no reason to disbelieve this version of the prosecution specially for 10 days they were together and there was nothing to prevent appellant committing this crime. The conclusion ended in medical certificate at Exh. 28 about no evidence of recent intercourse must be construed with respect to some hours previous to the examination of the body of the victim. It could not be stretched for 10 days and, therefore, the version of prosecutrix is reliable in this respect that even after 13th of April, 1996, the appellant continued to ravish her. Injuries on the body of the victim is also not necessary in all cases to be sine qua non for proving forcible intercourse, especially in this case, having regard to the fiduciary relationship between the two, there is no reason to disbelieve the case of prosecutrix when in clear terms she stated that in absence of his wife, the appellant used to call the victim to his house and committed rape. The version of prosecutrix cannot be thrown overboard only because she did not convey this aspect to any of her family members. As aforesaid, when any person ravishes the carnal knowledge of the female human body and in this case when

victim is rustic village girl, it would not be natural to expect that the victim would publicize even to her family members that she was raped by appellant. Nothing else is brought about in the cross of the defence to come to the conclusion that the version of the prosecutrix suffers from such basic infirmity that in all probability it would not be safer to place reliance on her version. The victim in such cases is not expected at all to implicate any person falsely when her own reputation would be at a stake. The incident did not come to light earlier because it appears that it was very difficult for the school girl to inform in this respect to his family members. Committing rape once is casting stigma for ever and on these circumstances, weighing the prosecution case on the anvil of reality of life, it clearly appears that on account of forcible act once, the consequence of long drawn repetition of act followed. Therefore, the conduct in this respect of the victim on the contrary would support her version and lend credence the prosecution case.

24 The question then arises when it is established that rape is committed, as to whether the victim was a consenting party. Undoubtedly, it is established that

the victim was aged more than 16 years at the time of commission of crime. It must be noted that during trial it appears that no case of consent was either pleaded or advanced by way of defence. The defence was of total denial. Though the examination in cross of the witnesses and further statement recorded of the accused, no where it is stated that if at all case of rape is proved, it was with the consent of victim girl. The case of consent is developed in the submission of learned advocate for the appellant in this appeal. Without dwelling upon whether such case was advanced by the defence or not before the trial court, the submissions advanced on behalf of the appellant about the consent are dealt with. As aforesaid, it is mostly argued that long drawn relationship without interruption, conduct of the victim while she had an opportunity to run away from the custody of the appellant, and admission of father of the victim girl about her discontinuance of study on suspicion of illicit relation are the circumstances leading to inference of consent. Learned Advocate for the appellant has relied upon some cases on this aspect. It is necessary that it must be explored that what is consent in law with reference to the cases of rape and amounts to what state of mind. In a decision cited by learned

Advocate for the appellant in the matter of DEELIP SINGH alias DILIP KUMAR vs. STATE OF BIHAR, as reported in (2005) 1 SCC 88 the meaning of the consent is well discussed. In this case, the consent was discussed with reference to Cl. Secondly i.e. “without her consent” as envisaged by Section 375. After discussing Section 90 of the Indian Evidence Act, the Supreme Court observed that consent given in misconception of fact of promise of marriage is consent and breach of promise of marriage would not amount to act done without consent as envisaged by Cl. Secondly by Section 375 of the Indian Penal Code. That was the case wherein the alleged rape was committed on promise to marry and on breach of such promise, complaint under Section 376 came to be filed. There, the Supreme Court compared the consent with “will” and “submission”. In other case cited by the learned Advocate for the appellant is the matter of **UDAY vs. STATE OF KARNATAKA, as reported in (2003) 4 SCC 46**, where after going through of the meaning of Section 90 and dictionary meaning, Supreme Court held in the fact of that case that in the said case prosecutrix gave consent in misconception of facts and no offence was made out. Going through the decisions it clearly transpires that the consent constitutes exercise of utmost intelligence

knowing fully well pros and cons of giving consent from all angles. Therefore consent constitutes exercise of intelligence based on the knowledge of the significance and moral effect of the act. Consent is different from submission as every consent involves submission but the converse does not follow. In law, an act of helpless acquiescence in the face of inevitable compulsion, acquiescence, non-resistance or passive giving in when either that faculty is impaired or clouded by fear or vitiated by duress or influenced by any other reasons never amount to giving consent. Consent has to be conscious and voluntary act. In this respect before dealing with the submissions made by learned advocate for the appellant, it is necessary to resort to the observations made by the Apex Court in the matter of **STATE OF RAJASTHAN vs. N.K., as reported in 2000 (5) SCC 30.** The decision is delivered by Hon'ble Three Judges Bench of the Apex Court. Necessary it is to note that in the said decision, again the Apex Court sounded the note of caution that testimony of prosecutrix should be appreciated on the basis of probabilities like testimony of other witnesses and conviction can be based on solely on such testimony. The Apex Court observed as under in para 18 and 19.

"18. Absence of injuries on the person of the prosecutrix has weighed with the High Court for inferring consent on the part of the prosecutrix. We are not at all convinced. We have already noticed that the delay in medical examination of the prosecutrix was occasioned by the factum of the lodging of the FIR having been delayed for the reasons which we have already discussed. The prosecutrix was in her teens. The perpetrator of the crime was an able-bodied youth bustling with energy and determined to fulfill his lust armed with a knife in his hand and having succeeded in forcefully removing the victim to a secluded place where there was none around to help the prosecutrix in her defence. The injuries which the prosecutrix suffered or might have suffered in defending herself and offering resistance to the accused were abrasions or bruises which would heal up in the ordinary course of nature within 2 to 3 days of the incident. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at

the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In Sk. Zakir absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh, this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In Karnel Singh the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a

formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a commonsense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.

19. For of the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. Consent is immaterial in certain circumstances covered by clauses thirdly to sixthly, the last one being when the woman is under 16 years of age. Based on these provisions, an argument is usually advanced on behalf of the accused charged with rape that the absence of proof of want of consent where the prosecutrix is not under 16 years of age takes the

> assault out of the purview of Section 375 of the Indian Penal Code. Certainly consent is no defence if the victim has been proved to be under 16 years of age. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable."(Emphasis supplied).

Thus, even if the victim girl is above 16 years of age, her consent cannot be presumed and the inference as to consent can be drawn only on the basis of defence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse and that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw

an inference as to her consent or else the testimony of prosecutrix is such as would be inherently improbable. Now reverting to the facts of the present case, prosecutrix as aforesaid stated on oath that she was raped and that too without her consent and against her will. The say of the prosecutrix has to be believed because there is nothing on the record to indicate that the say of the prosecutrix is improbable or suffers from inherent infirmities. As above said, victim being student of the appellant, must be under his influence. Without knowing of significance of the moral effect on the part of the victim, the appellant must have established physical contact with the victim girl. True it is that, in her testimony, she goes to the extent to say that this relationship continued for about six months, but, however, no inference can be drawn from this long drawn relationship that the victim was consenting party because of influence of fiduciary relationship between the appellant and the victim as teacher and student and the victim being of rustic villager school girl, once the appellant started ravishing her, it would have been very difficult for her either to inform her family members or even not to visit the appellant. In these circumstances when

victim says on oath that appellant forcibly committed rape, her say must be believed and no inference of consent can be drawn from the long drawn relationship. True it is that, she has admitted that she had gone various places along with the appellant. It was argued that there was opportunity to inform other persons or to run away from the custody of the appellant. In this respect again it must be noted that the victim was a school girl of a village and pregnant. She was made pregnant by the appellant. She was not in a position to inform her family members let alone to strangers. Moreover, it was compulsion on her part to remain with the appellant and that was her pregnancy. Where she could have gone in these circumstances, abandoning everything except to be with person who forcibly made her pregnant. This is not a case of intelligent human being to take decisions on her own volition as mentioned by learned Advocate for the appellant basing his arguments on the decisions of the Supreme Court in the matters of (i) **JINISH LAL SAH vs. STATE OF BIHAR, as reported in (2003)1 SCC 605; (ii) UDAY vs. STATE OF KARNATAKA, as reported in (2003) 4 SCC 46 and (iii) AMAN KUMAR vs. STATE OF HARYANA, as reported in (2004) 4 SCC 379**. True it is that, the conduct of the victim

may me a relevant aspect with the facts of a given case. In this case the conduct of the victim does not express element of willingness but it discloses the element of compulsion and helplessness and antagonizing the case of consent on her part. Any girl in the place of victim would have acted and conducted herself in this manner only and, therefore, the victim stated in her deposition that the appellant stated to her that there was no other alternative for the victim girl except to accompany the appellant. This is more clarified by the evidence of PW-3 Jaswantsinh Bhikhubha Jadeja. Here, it is necessary to discuss that the contradictions which are attempted to bring on record are not the contradictions destroying the prosecution case. Embellishment, inconsistency and discrepancies not affecting the core of prosecution case are immaterial. It must also be noted that in criminal trials, the evidence of witnesses has to be appreciated on broad probabilities and with reference to credibility of witness. If the witness is found credible, something witness omitted to state before the Investigating Agency, would not destroy the core of prosecution case. On appreciating the evidence as well if it is found that the witness is credit worthy, his

say in deposition which might have been omitted before the police, can be believed and relied upon. From the evidence of PW-3 it clearly appears that before the Police as well the case of the victim was about forcible intercourse. It is immaterial whether threat was administered before committing the crime or thereafter. Therefore, such contradictions asked in examination in cross in para 11 of the deposition of the victim would not shake the credibility of the witness nor from this it could be inferred that the victim was a consenting party. When the victim is found credible on the aspect that there was no other alternative as stated by the victim except to go with the appellant would not by itself constitute consent on the part of the victim. These circumstances along with material circumstances that she was pregnant and, therefore, there was compulsion on a victim to leave house as indicated by the appellant established beyond doubt that there was no consent on her part nor consent can be inferred from these circumstances as well. Considering the whole evidence in its totality, it is clear that this is a case where the rape was committed against the will of the victim and without her consent. Irrespective of the defence of the

appellant which he did not took take to the trial, scanning the evidence and circumstances, there is no iota of doubt that the prosecution proved its case to the extent that rape is committed by the appellant without consent of the victim.

25 Considering the third contention in respect of offence punishable under Sections 363 and 366 of the Indian Penal Code, it is clear that the word taking away envisaged by Sections 361 of the IPC must be broadly construed. Here, again it was argued that the victim was willingly visiting the appellant and willingly left her house after opening the bolted door early in the morning. It was also argued that the family members of the victim knew about her relationship and, therefore, she was forced to leave her studies. It was also argued that continued the relationship for about six months and stayed with the appellant for about 10 days, nor before 13th of April, 1996 any time any complaint was made by the victim to anybody nor during her stay with the appellant in those 10 days victim made any complaint to any person against the appellant even there were ample opportunities. The argument is, therefore, there is no element of force as envisaged by phrase “taking away”

used in Section 361 of the Indian Penal Code. The reliance is placed on a decision of Supreme Court in the matter of S.VARADARAJAN vs. STATE OF MADRAS, as reported in AIR 1965 SC 942. It was argued that the victim left her house on her own volition and case is not made out either under Section 363 or 366 of the Indian Penal Code.

26 Having gone through the evidence on record and the circumstances of the case, the submission advanced cannot be accepted. The cases which are relied upon and broadly the case of S. Varadarajan (supra) is a case of college going girl who after telephoning the accused called him and resumed with him in his car. While this is a different case. Noteworthy it is that in the said decision of Varadarajan (supra) the Apex Court was pleased to observe as under in para-9.

> “It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be

> regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the information of the intention of the minor to leave the house of the guardian.

Thus, the phrase used “taking” in Section 361 of the Indian Penal Code must be interpreted widely. Here in this case, it must be noted that being teacher of the victim girl, the appellant ravished her repeatedly. The circumstances ultimately culminated into pregnancy. The victim girl was so helpless that she was virtually at the command of the appellant. The credit worthy say of the

victim amply proves that the appellant dictated her to leave her house and there was no other alternative except that in the circumstances. Undoubtedly, if the deposition of the victim is appreciated with reference to the above circumstances taking away and enticement is apparently found and it is found that the victim must be under the duress that when she was pregnant and was not able to declare, only resort for her was to leave the house of her parents. Here the element of taking away and enticing surfaces. In this respect, it is necessary to deal with the arguments of learned Advocate for the appellant that the age of the victim could not be proved to be below 18 years of age as to constitute offence under Section 363 or 366 of the Indian Penal Code. It is stated that though Register at Exh. 24 and the Certificate at Exh. 25 are produced on record by PW-4 Mahendrakumar Jayantilal Upadhyay, had no personal knowledge about the roles. It was argued that the name of the victim was entered after the registration by red ink and, therefore, neither the deposition of PW-4 Mahendrakumar Jayantilal Upadhyay nor Exh. 24 or Exh. 25 can be relied upon.

27 The registers of births and deaths are kept by

the local authorities in pursuance of statutory provisions. Unless it is shown that this register kept by the local authority or government are other wise not reliable, it shall be presumed that those registers are the official record is in pursuance of the statutory provisions. PW-4 Mahendrakumar Jayantilal Upadhyay might not have personal knowledge about this register because he was not employed as Clerk at the time and he is witness only to produce a record which has presumptive value. It must be noted that in Hindus and so many others, it is a custom that the child will bear name after some days of the birth. In many cases the birth of the child is not registered along with the name in birth registers. Only after naming the child, her or his name is being recorded in concerned register or sometime it is also not done. With reference to conduct of the deposition of father of the victim girl and having regard to the evidentiary value of Exh. 24 and Exh. 25, it is established beyond doubt that the date of birth of the victim is 31st of May, 1979 and on 13th of April, 1996, she was below 18 years of age.

28 As aforesaid when the offence under Section 363 of the IPC is established, the offence under Section

366 is also established. In this respect when deposition of the victim is scanned again, in term she has stated that wherever they went the appellant establishing physical contact with her. There is nothing on the record to disbelieve this deposition. Noteworthy it is that the fact is established beyond doubt that both of them were found together from one place. It is also further stated by the victim that after Vankaner, the appellant took her to places where the relatives of the appellants were residing and, therefore considering this evidence, the element of offence under Section 366 of the IPC is established to the extent that she was seduced to illicit intercourse after abduction and, therefore, it could not be said that the offence under Section 363 or 366 is not proved.

29 True it is that the learned Trial Judge erroneously resorted to Section 114-A of the Evidence Act and raised presumption that it was for the appellant to establish element of consent and he failed. However, irrespective of Section 114(A) of the Evidence Act which applies to sub-sec (2) of Section 376 of the Indian Penal Code, the case of the appellant and the prosecution with respect to consent is thoroughly examined, as aforesaid

and it is found that though no presumption can be raised as to consent, prosecution established the case beyond doubt that rape was committed against the will of the victim and without her consent. It is necessary to understand that how this mechanism of burden of proof operates. True it is that it is the duty of the prosecution to prove that the crime is committed within the meaning of the clauses or any of the clauses of Section 375 of the Indian Penal Code. If prosecution succeeds in proving this case, then it is for the accused that to establish that if the act is proved, then it was with a consent. True it is that, the accused can take resort to the circumstances of the case and to the evidence of prosecution and while considering the evidence of prosecutrix as per guidelines given by the Apex Court, as aforesaid, the prosecution succeeds in establishing the case against the accused – appellant.

30 The decisions cited by learned Advocate for the appellant are in the facts and circumstances of that case. In the matter of **JINISH LAL SAH vs. STATE OF BIHAR, as reported in (2003) 1 SCC 605**, in the facts of that case, the case of the victim girl was that she was around 19 years though finding of the Doctor in respect

of her age was otherwise and denying the age of the victim below 19 years. In those circumstances the Apex Court held that the prosecution failed to establish the age of the victim below 18 years. On those circumstances it was also held that she had willingly left her house and there was no inducement and, therefore in para 7 of the said decision it is held that evidence on record indicated that victim girl willingly gone away with the appellant and in the absence of any threat, coercion or inducement. In the matter of **UDAY vs. STATE OF KARNATAKA, as reported in (2003) 4SCC 46**, the facts were altogether different to the extent that the victim girl consented the act of intercourse on promise of marriage, and the Apex Court held that the prosecutrix aged 19 years was capable of intelligence to understand the significance and moral quality of consenting and that she was conscious of the fact that her marriage with the appellant was difficult on account of caste consideration and it was also difficult to impute the appellant knowledge that prosecutrix had consented in consequence of a misconception of fact and that there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. In these circumstances the Apex Court held that the prosecution failed to prove each

and every ingredient of the offence including absence of consent being one of them. In the case of **AMAN KUMAR vs. STATE OF HARYANA, as reported in (2004) 4 SCC 379**, the court found that there was no evidence of penetration and therefore the case of prosecution was not believed. The Supreme Court observed that irreconcilable discrepancies were found in the evidence of prosecutrix and that the evidence of prosecutrix and Doctor did not specifically refer to penetration. In the matter of **DEELIP SINGH alias DILIP KUMAR vs. STATE OF BIHAR, as reported in (2005) 1 SCC 88** it was a case again of a promise to marry and victim consenting appellant for intercourse on such a promise. In those circumstances, the Apex Court held that even consent given in misconception of facts would amount to consent and no evidence could be established under Section 376 of the Indian Penal Code in breach of promise to marry. Likewise in the case of **STATE OF RAJASTHAN vs. KISHANLAL, as reported in (2002) 5 SCC 424**, again the facts were different as narrated in para 24 and 25 of the decision. It was established that though the brother-in-law of the prosecutrix and his wife were sleeping only 20-25 feet away, the prosecutrix could not raise alarm so as to attract their attention and therefore for the

circumstances mentioned in para 24 and 25, the case was not believable. The other decisions like wise cited by learned Advocate for the appellant are gone through and are found on different facts and those decisions are not helpful to the appellant. This is a case related to sordid and obnoxious incident as described by the Apex Court in the matter of State of Himalaya Pradesh vs. Shrikant Shekari (supra) and the prosecution has established its case beyond doubt. Except as above said, in respect of Section 114-A of the Evidence Act, the conclusions arrived at by the learned Trial Judge on re-appreciation of evidence independently are required to be upheld and no interference is required in said conclusion in this Appeal.

31 In view of above discussion, this Appeal stands dismissed.

(J.R. VORA, J.)

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